

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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P/S

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-2084

IN RE. MICHAEL SHERMAN

UNITED STATES OF AMERICA,

Petitioner-Appellee,

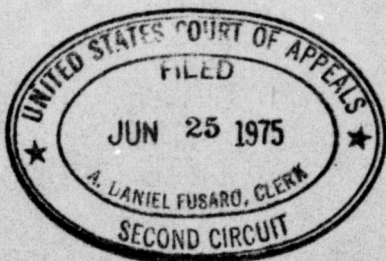
-against-

MICHAEL SHERMAN,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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In The
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IN RE. MICHAEL SHERMAN

UNITED STATES OF AMERICA,

Petitioner-Appellee,

-against-

MICHAEL SHERMAN,

Respondent-Appellant.

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the judgment must be reversed on the ground that neither the letter authorizing the United States Attorney to apply for an order granting immunity nor the order of the District Court extended to the May 1974 Special Grand Jury and that therefore no violation of Title 28 USC §1826 occurred?

2. Whether the judgment must be reversed on the grounds that appellant has validly raised the issue that he may have been subjected to electronic surveillance and that the government has failed to meet the requirements of a legally sufficient response?

3. Whether further confinement of appellant is prohibited by Title 28 USC §1826, appellant having already served a sentence for the term of another grand jury upon a judgment for civil contempt in a proceeding involving the same investigation?

4. Whether the judgment must be reversed on the grounds that the form letter appointing Special Attorney Ritchie was overly broad and failed to comply with Title 28 USC §515(a), Special Attorney Ritchie being, therefore, an unauthorized person before the grand jury and his questioning as well as his offer to grant immunity before the grand jury invalid?

5. Whether the judgment must be reversed on the grounds that the government's questions constituted an improper invasion of the attorney-client privilege and violated the Sixth Amendment protection of the right to counsel?

STATEMENT PURSUANT TO RULE 28(3)

(a) Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Costantino, D.J.) finding the appellant Michael Sherman in civil contempt pursuant to 28 U.S.C. §1826(a) for his refusal to answer questions before the Special May, 1974 Grand Jury and committing him to the custody of the United States Marshall, for the life of the Special May, 1974 Grand Jury, but not to exceed six months, or until such time as he purges himself of the contempt. During the pendency of his appeal, Mr. Sherman has been permitted to remain at large on \$1,000. personal recognizance bond.

(b) Statement of Facts

On March 17, 1975 the Hon. Thomas C. Platt, D.J.E.D., signed an order pursuant to 18 U.S.C. 6002-6003 compelling the testimony of appellant-respondent Michael Sherman, (hereinafter referred to as Mr. Sherman) and granting him immunity from prosecution as a result of such testimony. (102a-103a)* As stated by Special Attorney David J. Ritchie, (hereinafter referred to as Mr. Ritchie) in his affidavit in support of the application, the order was being sought on the grounds

"4. That MICHAEL SHERMAN, while appearing on March 3, 1975 before the Grand Jury conducting the inquiry repeatedly asserted his fifth amendment privilege with respect to the question asked." (98a)

The Grand Jury before which Sherman had appeared was the May, 1972 Special Grand Jury for the Eastern District of New York. (23a)

The application to the Court, again by Mr. Ritchie for David G. Trager, U.S. Attorney, E.D.N.Y. states

"2. That the witness MICHAEL SHERMAN has been subpoenaed to appear before the Grand Jury on March 17, 1975..."

"3. That the witness MICHAEL SHERMAN is expected to invoke and *has invoked the Fifth Amendment as a ground for refusing to answer the questions posed to him by the aforesaid Grand Jury.*" [emphasis added]

* Numbers in parentheses refer to pages in the Appendix.

"4. That it is necessary to the public interest that the witness be required to answer questions directed to him before the aforesaid Grand Jury." [emphasis added] (100a-101a)

On the same day that the Order was signed, Sherman was taken before the May, 1972 Special Grand Jury, and the order read and explained to him (pp. 4-5 Grand Jury minutes 3/17/75). He was returned to the same Grand Jury for continued questioning on March 24, 1975. Having answered numerous questions on the two dates he refused to answer certain others. (pp. 22-25 Grand Jury minutes 3/24/75). He was then taken before the Court where Platt, D.J. directed that Sherman return to the Grand Jury and answer the following questions:

"Who did you get the money from when referring to how much money was paid to Mr. Fisher, namely, the thousand dollars."

"The question was "Who did you get the money from to make that payment?"

Two: "Who gave you the \$1,000 to pay Mr. Fisher?"

Three: "Who gave you the \$1,000 to pay Mr. Fisher?"

Four: "Who gave you the money you gave to Mr. Youtt?"

Five: "Did Mr. Youtt represent you at the time of sentencing?"

Six: "Who paid Mr. Fisher a thousand dollars to represent you?" (136a-137a)

Upon his persistence in refusing to answer, he was again taken before Judge Platt who held him in contempt pursuant to 28 U.S.C. §1826 and sentenced him

"For a period of six months or the term of the May, 1972 Grand Jury, whichever is shorter..." (142a-1)

The term of the May, 1972 Special Grand Jury expired on May 2, 1975 on which date Mr. Sherman was released from custody (23a-24a). However, long before his original term was completed the Government had begun the process of seeking to have Sherman cited for contempt before a different Grand Jury. (minutes of Special May, 1974 Grand Jury - April 21, 1975).

No effort was made to seek new authorization from the Attorney General pursuant to 18 U.S.C. 6002-3 for an order compelling testimony and granting immunity; nor even for a new order based on the old authorization. (97a) Instead Mr. Ritchie simply advised Mr. Sherman in his appearance before the new Grand Jury that he was being directed to testify under the original grant of immunity signed by Judge Platt on March 17, 1975. (Transcript of Minutes of Special May, 1974 Grand Jury May 5, 1975 pp. 2, 4).

Sherman was then asked the following questions:

1. Who paid Mr. Youtt's fee at the time of sentencing on the Superfecta indictment?
2. Who paid your attorney fees to Mr. Fisher?
3. Now, directing your attention to March 20, 1973, on that day did you have occasion to speak with Marvin Proman concerning a race, a Superfecta race that night at Roosevelt Raceway involving Alan Canter on Hempstead Champ?
4. Isn't it a fact that you told Marvin Proman that if he got Alan Canter to finish out of the top four in that Superfecta race, that he would be given \$1,000 from you?
(Transcript of Minutes of May, 1974 Special Grand Jury May 5, 1975 pp. 6-8).

Upon his refusal to answer, on Fifth Amendment grounds, he was taken before the Court (Costantino, D.J.) and directed to answer the questions. He persisted in his refusal and subsequently in an opinion dated May 27, 1975 (143a-150a) Judge Costantino held that Deputy Attorney General Laurence H. Silberman's letter of March 14, 1975 is sufficient authorization to apply to the May, 1974 Special Grand Jury. By order dated June 2, 1975 (151a) Sherman was held to be in civil contempt and sentenced for the life of the Special May, 1974 Grand Jury, but not to exceed six months.

By affidavit sworn to and submitted to the District Court on May 14, 1975, Sherman set forth his claim that he had been subjected to electronic surveillance, his reasons therefor and a request for affirmation or denial of his allegations. (105a-107a)

According to the affidavit, Sherman had been a fugitive for at least 7 months when on June 24, 1974, being then in Los Angeles, California, he participated in a telephone conversation with an individual who was then in the State of New York. He told the other party of his need for money for attorneys' fees and arranged to have money sent to him via Western Union to a specified Western Union office, addressed to a mutual friend.

The very next day, June 25, 1974, Sherman was apprehended by FBI agents at the specified Western Union office in the company of the mutual friend.

In his various appearances before both Grand Juries the source of moneys for legal representation was constantly questioned. As already indicated both findings of contempt involved the refusal to answer questions relating to the source of legal fees.

The Government's only responses to the claim of electronic surveillance are statements, conclusory in nature, not by way of affidavit, nor given under oath, made by Mr. Ritchie during the discussion before Judge Costantino on May 14, 1975 denying that there was electronic surveillance of Mr. Sherman's conversations.

The following excerpt demonstrates how Mr. Ritchie's own position has been undercut by the limitations and qualifications of his denial:

"MR. WEISS: . . . Now, on the allegations that electronic surveillance was utilized, it is my understanding that it is not sufficient for Mr. Ritchie to come forward and say in front of the Court that he can testify there was no electronic surveillance. It is my understanding he must come in on a sworn affidavit on the basis of an investigation, internally conducted, affirming or denying whether or not there was electronic surveillance.

"THE COURT: *Either that or he must tell the Court that he made a complete search of all of the departments that might have information on it and reveal whether or not there was electronic surveillance. [emphasis added]*

"MR. WEISS: On the basis of that response we can make our next application to the Court as to what ought to transpire.

"MR. RITCHIE: I am familiar with the investigation that led up to the capture of Mr. Sherman who was a fugitive at that time --

"THE COURT: No. He is asking you to file an affidavit and *I don't think it is necessary if you place on the record that you called the Justice Department or your own chief and you are advised there had been no electronic eavesdropping of this respondent under the circumstances, and you can make that full disclosure on the record. That is all the Court requires. I don't ask you to sit down and write out 'I, David Ritchie --' [emphasis added]*

"MR. WEISS: Some courts require that.

"THE COURT: I don't. I take a lawyer's word for it. If they give me false information, then --

"MR. WEISS: In the *Smilow* case I believe the Supreme Court found when the matter reached it for the first time, the Government said 'Gee, that information we gave you off the top of our heads is not right.'

"THE COURT: That happens, too. If it is an honest mistake, that is one thing. But, if deliberate, that is another thing.

"MR. WEISS: There are eight agencies of government and we would require a response from each --

"MR. RITCHIE: I can't say that I contacted eight agencies but I will tell you under oath that I contacted the one agency involved in this case and that is the FBI, and the one agency that captured Mr. Sherman at that time that he was a fugitive, and it was at the time he was captured that he

alleges he was the subject of the electronic surveillance, and I can state to the Court that there was no electronic surveillance by that agency. *The agents were not aware -- the agents who captured Mr. Sherman -- were not aware of any electronic surveillance.* Their information came through more traditional means. [emphasis added]

"THE COURT: That's all he can tell us.

"MR. WEISS: Right, and I don't think that is sufficient.

"THE COURT: Sure.

I'll accept that statement." (59a-61a)

The Court's attention is respectfully directed to the Memorandum dated May 5, 1975 (74a) which details certain additional facts of interest concerning Mr. Sherman. It is respectfully requested that the Court deem said Memorandum to be included in its entirety at this point.*

*One final factual note is the correction of what is obviously a typographical error, but a very critical one. It occurs during the hearing of May 14, 1975 in a discussion relating to the attorney-client privilege as follows:

"MR. WEISS: My client advises me that his recollection is that he did waive the lawyer-client privilege at that time." (50a)
That should read "he did *not* waive" etc. etc.

POINT I

THE JUDGMENT MUST BE
REVERSED ON THE GROUND THAT
NEITHER THE LETTER AUTHORIZING
THE U. S. ATTORNEY TO APPLY FOR
AN ORDER GRANTING IMMUNITY NOR
THE ORDER OF THE DISTRICT COURT
EXTENDED TO THE MAY 1974 SPECIAL
GRAND JURY AND THAT THEREFORE NO
VIOLATION OF TITLE 28 USC §1826
OCCURRED.

It is clear on the face of the documents set forth as exhibits on pages 97a-104a of the Appendix and as detailed in pages 1-5 (supra) that the affidavit, the letter of authorization, the application and the order were all intended to and did apply only to the May 1972 Special Grand Jury. The learned Court below, in its opinion, suggests that by authorizing an application "for an order *or orders*" (emphasis by the Court) the letter validly applies to the new Grand Jury. As will be argued infra, this is an erroneous reading of both the letter and 18 USC 6002-6003. But assuming arguendo that it is an accurate interpretation, the fact remains that no new order was applied for or granted.

The Government appears intent upon attempting to utilize the civil contempt power to coerce Sherman into abandoning his Fifth Amendment right to remain silent. To the extent that a valid offer of testimonial immunity is proffered, he is obligated to cooperate. It is contended here, however, that absent a new letter of authorization, empowering the United States Attorney to apply anew to the District Court for an order pursuant to 18 USC 6002-6003, that the prosecutor is powerless to seek, and the Court to grant, immunity from prosecution.

Simply put, Sherman contends that each grand jury constitutes a separate proceeding requiring an individual authorization for seeking and an individual order for granting immunity. The Government's assertion that Deputy Attorney General Silberman's letter of March 14, 1975 and Judge Platt's order of March 17, 1975 are valid for the May, 1974 Special Grand Jury, is sharply disputed by Sherman. The implied claim that Mr. Silberman's letter and Judge Platt's order intended to authorize placing Sherman before unknown grand juries, *in futuro*, without limitation as to time or number is a dangerous and alien concept.

A fair reading of Mr. Silberman's letter reveals a limited authorization to seek immunity before a then existing grand jury. It was patently not Mr. Silberman's intent to grant Special Attorney Ritchie *carte blanche* and timeless use of the immunity application power.

With the expiration of the life of the May 1972 grand jury, Mr. Ritchie's authorization, to make application for an order granting immunity, terminated as did the right to utilize Judge Platt's order.

It is contended that the old authorization of May 14, 1975 existed only so long as the life of the earlier grand jury. With the termination of that grand jury the authorization ceased to have force and effect as a statutory predicate for the judicial grant of testimonial immunity. Accordingly, until such time as a new authorization is obtained*, the District Court lacks the power to issue an order granting immunity. As indicated above no such order was sought.

*The need for a "fresh" authorization becomes especially significant when one considers that since the authorization of March 14, 1975 the Hon. Edward Levi has been confirmed as Attorney General, and the Hon. Harold Tyler has become Chief of the Criminal Division. It may well be that these new Justice Department officials would decline to authorize additional grand jury action, and an additional grant of immunity. The need for reapplication and reexamination seems to be more than appropriate.

In such a circumstance the Fifth Amendment privilege to remain silent remains viable. The judgment holding Sherman in contempt must therefore be vacated.

One remaining question to deal with in this point is whether the May 1974 Special Grand Jury can be construed to be a "proceeding resulting from or ancillary to" the May 1972 Grand Jury as that phrase is used in the March 14, 1975 letter of authorization or "ancillary to" as used in 18 USC 6002-6003. As for the phrase "resulting from", logic alone indicates that since the May 1974 Grand Jury was not called into being to deal with Mr. Sherman, its existence did not result from Mr. Sherman's appearance before the May 1972 Grand Jury. It is most likely that the phrase is intended to apply to trials resulting from Grand Jury indictments.

An "ancillary" proceeding has been defined as one subordinate to or in aid of another primary action. *Schram v. Roney*, 30 F.Supp. 458, 461 (D.C. Mich., 1939; see *Glens Falls Indemn. Co. v. U.S. ex rel and to use of Westinghouse Elec. Supply Co.*, 229 F.2d 370 (9th Cir. 1955); *Black's Law Dictionary* 4th Ed. p. 112. It is obvious that the May 1974 Grand

Jury can in no way be considered ancillary to the May 1972 Grand Jury.

The Court's attention is directed to *U.S. v. Giordano*, 416 U.S. 505 (1974) in which the United States Supreme Court very strictly construed the procedural safeguards and requirements built into the 1968 Omnibus Crime Control and Safe Streets Act. Although the Sections of the code (18 USC 2510 et seq.) differed from the ones we are dealing with here, the issues were all but identical, i.e., was power exercised by one authorized by statute? and were the procedural requirements for seeking certain orders and authorizations (regarding electronic surveillance) in accord with the statutes?

POINT II

APPELLANT HAVING VALIDLY RAISED THE ISSUE THAT HE MAY HAVE BEEN SUBJECTED TO ELECTRONIC SURVEILLANCE THE GOVERNMENT HAS FAILED TO MEET THE REQUIREMENTS OF A LEGALLY SUFFICIENT RESPONSE AND EITHER THE JUDGMENT MUST BE REVERSED OR COMPLIANCE MANDATED.

It is now well recognized that a grand jury witness who believes he has been the subject of unlawful electronic surveillance may validly decline to respond to grand jury questioning even if the recipient of testimonial immunity (*Gelbard v. United States*, 408 U.S.41 (1972); 18 USC 2525; *People v. Einhorn*, 35 NY2d 948, 949 (1974)).

It has been held that a grand jury witness is justified in seeking an affirmation or denial of electronic surveillance from the government if he asserts that he has been the subject of electronic surveillance and there are circumstances indicating the possibility of electronic surveillance. *In re Evans* 452 F.2d 1239 (D.C. Cir., 1971). In *In re Evans* where the court upheld the sufficiency of the witness' allegation of electronic surveillance, there were no specific facts indicating possible electronic surveillance, only the general background of government activity against anti-war protestors. In *U.S. v. Alter*, 482

F.2d 1016 (9th Cir., 1973) where the witness recited, among other things, that the FBI had arrived at a certain site where the witness and a friend had arranged to meet by telephone, the court upheld the sufficiency of the allegation of electronic surveillance. The fact that Sherman was taken into custody after being a fugitive for more than 7 months only after making a long distance telephone call, should therefore suffice to justify his seeking an affirmation or denial of electronic surveillance from the government.

The government made its denial of electronic surveillance by way of Special Attorney Ritchie's unsworn oral statement on May 14, 1975. It has been held that a government denial of alleged electronic surveillance must be in affidavit form. *U.S. v. Toscanino*, 500 F.2d 267 (2nd Cir., 1974). In the most recent Second Circuit decision involving this issue the Court criticized the government's failure to make its denial of electronic surveillance by affidavit, but did not remand because affidavits were in fact submitted directly to the Circuit Court. *In re Buscaglia et al* ___F.2d___ Slip Op. 3504 (2nd Cir., May 1, 1975).

On May 14, the District Court stated it

would not require an affidavit if Special Attorney Ritchie would place on the record that he had made a complete search of all of the government departments that might have information on electronic surveillance of Sherman and then revealed whether or not there had been electronic surveillance of Sherman or that he had called the Justice Department or his own chief and had been advised that there had been no electronic surveillance of Sherman (60a). In response Special Attorney Ritchie stated:

"I contacted the one agency involved in this case [the FBI] ... and I can state to the Court that there was no electronic surveillance by that agency. The agents were not aware, the agents who captured Mr. Sherman, were not aware of any electronic surveillance."
(61a)

Clearly Special Attorney Ritchie failed to respond as the Court had directed. We fail to see why the Court, in contradiction of its previous request, accepted Special Attorney Ritchie's denial of alleged electronic surveillance as sufficient.

Special Attorney Ritchie stated that he had contacted the only agency involved in the investigation and on the basis of that contact learned that the arresting agents were not aware of any electronic surveillance. He offered no facts in support of his

conclusion that the FBI was the only agency involved. He did not exclude the possibility that the arresting agents' superiors were aware of electronic surveillance.

Therefore, respondent calls upon the Court to direct the Government, pursuant to 18 USC 3504, to conduct an internal investigation and submit a sworn affidavit affirming or denying the use of electronic surveillance (see *United States v. Toscanino*, 500 F.2d, 267, 281 (2d Cir. 1974); *In re Evans*, 452 F.2d 1239, but cf. *United States v. Grusse and Turgeon*, ___ F.2d ___, Slip Op. 2039 (2d Cir., Feb. 27, 1975)).

Should the Government disclose that respondent has been the subject of such electronic surveillance, we would ask for discovery of the eavesdrop order and supporting affidavits. (See *In re Lochiatto*, 497 F.2d, 803 (1st Cir. 1974); *In re Mintzer*, 511 F.2d, 471, 473 (1st Cir. 1974)). At the very least, we would ask the Court to conduct an *in camera* inspection of the eavesdrop order and supporting papers to insure that they have been obtained in conformity with the statutory prerequisites. (See *In re Persico*, 491 F.2d, 1156 (2d Cir. 1974), *cert. den.* 419 U.S. 924 (1974)).

POINT III

FURTHER CONFINEMENT OF APPELLANT IS PROHIBITED BY TITLE 28 USC §1826, APPELLANT HAVING ALREADY SERVED A SENTENCE FOR THE TERM OF ANOTHER GRAND JURY UPON A JUDGMENT FOR CIVIL CONTEMPT IN A PROCEEDING INVOLVING THE SAME INVESTIGATION.

The language of Section 1826 is very specific. The Court is authorized upon refusal of a witness to comply with its order to testify to order his confinement "until such time as the witness is willing to give such testimony." But the statute then proceeds to provide some very clear cut limitations as follows:

"No period of such confinement shall exceed the life of

- (1) the court proceeding, or
- (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

It can not be questioned that respondent has (1) served a sentence for civil contempt for refusing to comply with the Court's order dated March 17, 1975 to testify before a Special Grand Jury, (2) that this refusal occurred before the May 1972 Special Grand Jury whose life terminated on or about

May 2, 1975, and (3) that the subject matter of the investigation being conducted by the May 1974 Grand Jury is identical to that of the May 1972 Grand Jury. (23a-24a)

It may be arguable that prior to the adoption of Section 1826 even in spite of the manifest unfairness of punishing someone repeatedly for the identical offense, the cases permitted it.

With the adoption of Section 1826 Congress clearly delineated both the power of the courts and the extent of permissible punishment. The outside limit the statute allows is 18 months or the life of the Grand Jury whichever is less. The choice of which Jury to place respondent before belonged to the Government. Having made that choice, and the respondent having served the time which the law allowed, the Government should not now be aided in its efforts to have the court disregard the clear intent of Congress.

It must be pointed out to the Court that the case law interpreting the penalty provisions of 28 USC §1826 is terribly meagre. Only one Circuit appears to have addressed itself to the issue and the holding there is adverse to the position urged herein. *United States v. Duncan*, 456 F.2d 1401,

1406-7 (9th Cir. 1972) vacated for further consideration in light of *Gelbard v. U. S.* 408 U.S. 41 (1972), 409 U.S. 814 (1972).

POINT IV

THE FORM LETTER APPOINTING SPECIAL ATTORNEY RITCHIE BEING OVERLY BROAD AND FAILING TO COMPLY WITH 28 USC 515(a). SPECIAL ATTORNEY RITCHIE WAS AN UNAUTHORIZED PERSON BEFORE THE GRAND JURY. HIS QUESTIONING OF APPELLANT AS WELL AS HIS OFFER TO GRANT IMMUNITY BEFORE THE GRAND JURY WERE INVALID AND THEREFORE THE JUDGMENT MUST BE REVERSED.

David J. Ritchie is a Special Department of Justice attorney assigned to the Brooklyn Strike Force and is not an Assistant United States Attorney. As such a special attorney, his power to act is generated by and must conform with the mandates of 28 USC 515(a) which states:

"The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings.."

Upon information and belief, Mr. Ritchie was assigned to general legal duties as a member of the Strike Force, and was not "specifically directed" by the Attorney General to investigate and present

to a Grand Jury the matter of Michael Sherman.

Sherman respectfully submits that to the extent that the Brooklyn Strike Force generally, and Special Justice Department Attorney Ritchie in particular have attempted to accrete to themselves additional powers neither contemplated nor legislatively recognized, they are acting in an *ultra vires* manner and beyond their power. In essence, since prosecutor Ritchie's power is not sufficiently circumscribed to fit within 28 USC 515(a) he is powerless to question Sherman, seek statutory immunity for Sherman, or move to have Sherman cited for civil contempt. (28 USC 1826(a) (18 USC 6002, 6003).

In addition, since prosecutor Ritchie and the local Strike Force have exceeded their power by dint of the unreasonably and unlawfully broad Justice Department form letter, Ritchie and his prosecutorial colleagues are improper persons to be presenting evidence, questioning witnesses and making general use of the expansive federal grand jury power.

By reason of the fact that Ritchie was not specially authorized by the form letter to proceed in this case, neither he nor the Strike Force possessed *de jure* power to apply for immunity or move for an order seeking to hold respondent in civil contempt.

If 28 USC 515(a) means what it says, all

that can be said for Ritchie is that he is exercising *de facto* power under color of federal law. His power to lawfully function and his statutory authorization for compelling testimony in exchange for testimonial immunity are in serious doubt.

The position stated herein above is consistent with the line of cases which includes *U. S. v. Crispino*, 16 Cr.L. 2503 (S.D.N.Y., 2/13/75). A diametrically opposing line of cases includes *U. S. v. Brown*, 16 Cr.L. 2505, (S.D.N.Y. 2/24/75).

Moreover, the Second Circuit in its most recent decision on this issue appears to uphold the authority of United States Strike Force attorneys to present cases to grand juries under appointment letters giving them general authorization to investigate any federal crime. *In re Grand Jury Subpoena of Persico* 75-2030 (2nd Cir., May 21, 1975). The opinion, however, is not available for perusal at the time of this writing. Accordingly we have not had the benefit of examining the Court's arguments. Inasmuch as the United States Supreme Court has not yet passed on this important issue it is hoped that the Court will consider it appropriate for this issue to be included here.

POINT V

THE JUDGMENT MUST BE REVERSED ON THE GROUND THAT THE GOVERNMENT'S QUESTION CONSTITUTED AN IMPROPER INVASION UPON THE ATTORNEY-CLIENT PRIVILEGE AND VIOLATED THE SIXTH AMENDMENT PROTECTION OF THE RIGHT TO COUNSEL.

The Government has demonstrated an abiding, and it is contended, improper basis for ascertaining where and how respondent obtained the moneys to retain his attorney.

It has been held that generally the attorney-client privilege only extends to the substances of matters communicated to the attorney in confidence and that matters relating to receipt of fees from the client are not privileged because payment of fees is not generally a matter of confidence or a substantive communication. *U. S. v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963). A leading authority, however, writes:

"The test is ... whether the statement is made as a part of the purpose of the client to obtain advice on that subject." *Wigmore on Evidence* §2311 (McNaughton rev., 1961)

In the instant case it can be argued that one of Sherman's purposes in consulting an attorney was to find out whether he would be obliged to reveal

the identity of the source who paid his attorney fees. A communication to the attorney concerning the identity of the source would be "part of the purpose of the client to obtain advice on" the subject of consultation.

In such a circumstance, it is contended that Government questioning as to the identity of the source impedes the right to assistance of counsel.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS,
THE JUDGMENT APPEALED FROM MUST
BE REVERSED.

Respectfully submitted,

THEODORE S. WEISS
Attorney for Respondent-
Appellant

STATE OF NEW YORK
COUNTY OF NEW YORK

BARBARA WILLIAMSON being duly sworn deposes
and says: On JUNE 25, 1975 I served the
within record on appeal brief appendices on

ROBERT H. WALLACE the attorney for the
respondent by leaving mailing three copies thereof
at his office located at

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Sworn to before me
this 25th day of

June, 1975

Barbara Williamson

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1978